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No. _____

In The

Supreme Court of the United States

INTERCONTINENTAL BULKTANK CORPORATION *and* MARITIME OVERSEAS CORPORATION,

Petitioners,

versus

LEE SELICO,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should a seaman, to whom Congress, in its considered judgment, has denied the recovery of prejudgment interest on damages resulting from negligence, nonetheless be entitled to recover prejudgment interest if the damages result from unseaworthiness, a judicially created species of liability without fault?

2. Should a split in the circuits be allowed to continue which, combined with jurisprudence allowing the award of prejudgment interest on seaman's damages caused by negligence in cases tried at admiralty, can result in at least three different damage awards: 1) no prejudgment interest; 2) prejudgment interest on only that portion of the loss caused by unseaworthiness; or 3) prejudgment interest on the entire award? The result will depend on: 1) in which federal circuit, 2) in which state court the case is filed or 3) if in federal court, whether the case is tried at law or in admiralty.

LIST OF PARTIES

The following are the parties to this proceeding:

1. Lee Selico, respondent;

2. Intercontinental Bulktank Corporation, petitioner*

3. Maritime Overseas Corporation, petitioner**

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*Pursuant to Supreme Court Rule 29.6, petitioner, Intercontinental Bulktank Corporation, states that it is part of a group of companies which are owned by Overseas Shipholding Group, Inc., 511 Fifth Avenue, New York, New York 10017. Intercontinental Bulktank Corporation has no subsidiary companies.

**Pursuant to Supreme Court Rule 29.6, petitioner, Maritime Overseas Corporation, states that it has no parent or non-wholly owned subsidiaries.

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DECISIONS BELOW

The order and reasons of the Civil District Court for the Parish of Orleans, State of Louisiana is not reported and is reproduced in Appendix B (App. pp. 16a-20a). The decision of the Louisiana Court of Appeal for the Fourth Circuit is reported at 733 So.2d 1240 (La. App. 4th Cir. 1999) and is reproduced in Appendix A (App. pp. 12a-15a). The denial of the Application for Writ of *Certiorari* or Review by the Louisiana Supreme Court is reported at 1999 La. LEXIS 2828 and is reproduced in Appendix C (App. p. 21a).

JURISDICTION

On September 24, 1999, the Supreme Court of Louisiana denied petitioners' application for writ of *certiorari* or review. Petitioners now file their petition for writ of *certiorari*, pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following statute is involved in this petition:

46 U.S.C. § 688 (a) (The Jones Act):

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right to a trial by jury, and in such

action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as the result of any such personal injury, the personal representative of such a seaman may maintain an action for damages at law with the right to trial by jury, and in such action, all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the Court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

Selico, a seaman, filed suit against his employer, Intercontinental Bulktank Corporation, and Maritime Overseas Corporation (collectively referred to as "MOC") in the Civil District Court for the Parish of Orleans, State of Louisiana, seeking damages for personal injuries sustained on May 28, 1987, when he slipped in the engine room of the M/V OVERSEAS ALASKA on a combination of moisture and soot. The jury found MOC negligent and the M/V OVERSEAS ALASKA unseaworthy and attributed the cause of the accident equally to negligence and unseaworthiness. The jury specifically declined to award prejudgment interest (Appendix A, App. p. 5a).

On plaintiff's motion, the trial court granted judgment notwithstanding the verdict on the issue of prejudgment interest (Appendix B, App. pp. 16a-20a), despite

several arguments raised by MOC, including the arguments forming the basis of this petition. The district court was affirmed by the Louisiana Court of Appeal for the Fourth Circuit, with one member of the panel dissenting (Appendix A, App. pp. 12a-15a). MOC sought a Writ of *Certiorari* or review from the Louisiana Supreme Court, which writ was denied without written opinion on September 24, 1999 (Appendix C, App. p. 21a). One justice stated he would have granted the writ. MOC's arguments against the award of prejudgment interest set forth in this petition were raised in each court below.

REASONS FOR GRANTING THE WRIT

This Court should correct the error of the lower courts[1] which allows seamen to recover prejudgment interest if liability is based on the breach of warranty of seaworthiness and not based on fault, when Congress, which has occupied the field of maritime torts, does not allow the recovery of prejudgment interest if liability is based on fault. The lower courts' decisions are contrary to Congressional will, as well as to the logic and direction of the decisions of this Court.

The Court also should resolve a split in the circuits as to under what circumstances, if any, prejudgment interest is allowed on damages awarded to a seaman in an action against his employer.

"We sail in occupied waters."[2]

The question presented to this Court, which was raised in the courts below, is purely legal and can be

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[1] By lower courts, we mean not only the courts below, but all lower federal and state courts which, without exception, allow a Jones Act seaman to recover prejudgment interest if the judgment is not based on negligence. See *e.g., Domangue v. Penrod Drilling Corp.*, 748 F.2d 999 (5th Cir. 1984); *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985); *Martin v. Walk, Haydel & Assoc., Inc.*, 794 F.2d 209 (5th Cir. 1986); *Anglada v. Tidewater Inc.*, 752 F.Supp. 722 (E.D.La. 1990); *Melancon v. Petrostar Corp.*, 762 F.Supp. 1261 (W.D.La. 1991); *Marsh v. Penrod Drilling Co.*, 619 So.2d 1124 (La. App. 4th Cir. 1993); *Hughes v. Conticarriers & Terminals, Inc.*, 1992 U.S. Dist. Lexis 1642 (N.D. Ill. 1992); *Anderson v. Whittaker Corp.*, 894 F.2d 804 (6th Cir. 1990).

[2] *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36, 111 S.Ct. 317, 327 (1990).

simply stated: Should a seaman, who, pursuant to the considered judgment of Congress (expressed in 46 U.S.C. § 688 and 45 U.S.C. § 51, *et seq.*), is not entitled to recover prejudgment interest when a judgment is based on negligence, nonetheless be entitled to recover different and greater damages, *i.e.* prejudgment interest, when liability is based on unseaworthiness, a judicially created form of liability without fault?[3] The relevant Congressional enactments and decisional law of this Court strongly indicate that he should not.[4]

1. FELA was incorporated unaltered into the Jones Act.

The substantive recovery provisions of the Federal Employer's Liability Act (FELA), 45 U.S.C. § 51, *et seq.*,

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[3] *Mahnich v. Southern Steamship Co.*, 321 U.S. 96, 64 S.Ct. 455 (1944); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872 (1946).

[4] Although not directly implicated in this case, as state courts constitutionally cannot have admiralty jurisdiction, U.S. Const: Art. III § 2, the federal courts allow the award of prejudgment interest in the event of Jones Act negligence in cases tried "in admiralty" before a court while not allowing such in cases tried "at law" before a jury. *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985). This anomaly further calls for intervention by this Court to restore uniformity and appropriate deference to statute. The reasoning petitioners espouse in the instant case would result in the same outcome in seamen's cases tried "in admiralty" as "at law" with respect to prejudgment interest. Further, as will be discussed later, some courts allow prejudgment interest if the accident was caused by both unseaworthiness and negligence, while others do not. The circuits are split.

were incorporated unaltered into the Jones Act, 46 U.S.C. § 688. As this Court stated in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990):

> Enacted in 1920, the Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA [Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*] See 46 U.S.C. § 688.

Miles, 498 U.S. at 32, 111 S.Ct. at 325.

2. The denial of prejudgment is part of the substantive recovery provisions of FELA and thus also the Jones Act.

This Court has recognized that an award of prejudgment interest under FELA is not merely procedural. It is, in fact, part of the damages sought to be recovered. This Court specifically has held: "Prejudgment interest is normally designed to make the plaintiff whole and is part of the actual damages sought to be recovered." *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 335, 108 S.Ct. 1837, 1842 (1988). In *Monessen*, a Pennsylvania state court reasoned that it could apply its rules pertaining to prejudgment interest in a FELA case, as it held the award of prejudgment interest to be procedural, not substantive. This Court soundly rejected that reasoning, holding the award of prejudgment interest under FELA to be substantive, and thus controlled by federal law. This Court discerned a clear indication of legislative intent from Congress' silence on the matter, viewed in the appropriate historical context. Specifically, Congress, in passing FELA, addressed and dispensed with various other common-law doctrines, but did not address at all (and thus

left intact) the well-established common-law doctrine barring the recovery of prejudgment interest in personal injury and death litigation. *Monessen*, 486 U.S. at 337, 108 S.Ct. at 1843.

As discussed, this Court has acknowledged that "[T]he Jones Act makes applicable to seamen the substantive recovery provisions of the older FELA." *Miles*, 498 U.S. at 32, 111 S.Ct. at 325. Most lower courts, including the courts below herein and the Fifth and Sixth Circuits, have acknowledged that prejudgment interest is not recoverable in an action under a Jones Act suit brought at law. *Theriot v. J. Ray McDermott & Co., Inc.*, 742 F.2d 877, 883 (5th Cir. 1984); *Sanford Bros. Boats, Inc. v. Vidrine*, 412 F.2d 958, 972 (5th Cir. 1969); *Marsh v. Penrod Drilling Co.*, 619 So.2d 1124, 1126 (La. App. 4th Cir. 1993); see *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732, 741 (6th Cir. 1986). However, the Second Circuit, in an acknowledged split with the Fifth and Sixth Circuits, allows the recovery of prejudgment interest in a Jones Act action brought at law, if there is evidence of both negligence and unseaworthiness. *Magee v. U.S. Lines, Inc.*, 976 F.2d 821 (2d Cir. 1992). *Contra, McPhillamy v. Brown & Root, Inc.*, 810 F.2d 529, 531-532 (5th Cir. 1987).

This Court acknowledged that as a part of the substantive damages, "prejudgment interest may constitute a significant portion of an FELA plaintiff's total recovery," *Monessen*, 486 U.S. at 335, 108 S.Ct. at 1842, and "prejudgment interest constitutes . . . [a] substantial part of a defendant's potential liability under the FELA . . . ." *Monessen*, 486 U.S. at 336, 108 S.Ct. at 1843. In the instant case, the damage award was $142,845.01, of which the jury found 50% to be due to unseaworthiness. (Decision

of Court of Appeal, Appendix A, App. p. 52a; Trial Court's Order and Reasons, Appendix B, App. p. 17a). Prejudgment interest on the $71,242.50 attributed to unseaworthiness totals $70,837.12, an increase of more than 99% of the damages on which it was allowed. Proper application of the Fifth and Sixth Circuit rule to the instant case would result in no prejudgment interest award, as there is no logical way to apportion the cause of the accident, a slip and fall on wet soot, between unseaworthiness and negligence. Application of the Second Circuit's rule would result in an award of $141,674.24 in prejudgment interest, *i.e.*, prejudgment interest on the entire award.

3. "The *Miles* [U]niformity [P]rinciple,"[5] which requires courts to limit damages available under the general maritime law to damages allowed by the relevant federal statute operating in the same context, prohibits the award of prejudgment interest to seamen.

The syllogism which guided this Court's decision in *Miles* can be stated as follows:

(1) "Incorporating FELA unaltered into the Jones Act, Congress must have intended to incorporate the pecuniary limitation on damages as well." *Miles*, 498 U.S. at 32, 111 S.Ct. at 325;

(2) In an area covered by a statute such as the Jones Act, "It would be no more appropriate [for the courts] to

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[5] *Guevara v. Maritime Overseas Corporation*, 59 F.3d 1496, 1512, n. 1 (5th Cir. 1995) (*en banc*).

prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Miles*, 498 U.S. at 31, 111 S.Ct. at 325, quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 621, 98 S.Ct. 2010, 2015 (1978);

(3) Therefore, "We must conclude that there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." *Miles*, 498 U.S. at 33, 111 S.Ct. at 326.

Finally, and importantly, the *Miles* court noted "Today we restore a *uniform* rule applicable to all actions for the wrongful death of a seaman, whether under DOHSA, the Jones Act, or the general maritime law." *Id.* (emphasis added).

The same syllogism should apply equally to prejudgment interest. Just as state law in *Monessen* could not be used to supplement FELA to permit recovery of prejudgment interest, the general maritime law cannot be used to supplement the Jones Act to permit recovery of prejudgment interest. The syllogism is substantially similar to that in *Miles*:

(1) Through its incorporation of FELA, the Jones Act does not allow prejudgment interest (at least when the action is at law). *McPhillamy, supra;*

(2) The courts cannot award a Jones Act seaman greater or different damages than are permitted by the Jones Act, *Miles, supra.* (Prejudgment interest is considered "damages," *Monessen, supra.*);

(3) Therefore, prejudgment interest is not allowed a Jones Act seaman whether his recovery is under the Jones Act or under the general maritime law.

The *Miles* uniformity principle was stated succinctly in the unanimous *en banc* decision of the Fifth Circuit in *Guevara v. Maritime Overseas Corporation*, 59 F.3d 1496, 1512, n. 1 (5th Cir. 1995) (*en banc*):

> The analytical framework of *Miles* governs our approach to deciding damages issues in general maritime actions. In order to decide whether (and how) *Miles* applies to a case, a court must first evaluate the *factual setting of the case* and determine what statutory remedial measures, if any, apply in that context. *If the situation is covered by a statute like the Jones Act or DOHSA*, and the statute informs and limits the available damages, the statute directs and delimits the recovery available under the general maritime law as well. The general maritime law will not expand the available damages when Congress has spoken to the relief it deems appropriate or inappropriate.

Guevara, 59 F.3d at 1506 (emphasis supplied by the court).

Accordingly, as prejudgment interest is not allowed under the Jones Act, it cannot be allowed under the general maritime law in a seaman's personal injury or death action.

The analytical framework of *Miles* has led courts to extend the holding of *Miles* to require: (a) uniformity of damages awarded to seamen whose injuries do not result in death, whether the injury results from negligence or unseaworthiness, *Murray v. Anthony J. Bertucci Constr. Co.*,

958 F.2d 127 (5th Cir. 1992) and *Michel v. Total Transp., Inc.*, 957 F.2d 186 (5th Cir. 1992), and *Guevara, supra*; (b) the denial of punitive damages based on tort under the general maritime law, *Guevara, supra* (*Miles* effectively overruled Fifth Circuit precedent allowing recovery of punitive damages based on unseaworthiness); and (c) the denial of punitive damages based on the failure to pay maintenance and cure, *Guevara, supra*. The analytical framework likewise requires the denial of prejudgment interest to a seaman, even if the recovery of damages is based on general maritime law unseaworthiness.

4. It is both illogical and inconsistent with the judiciary's place in the constitutional scheme for the courts to allow the recovery of prejudgment interest when liability is not based on fault, when Congress has disallowed such when liability is based on negligence (fault).

Further guidance to the proper decision in this case has been provided by this Court:

> It would be inconsistent with our place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault, than Congress has allowed in cases of death resulting from negligence.

Miles, 498 U.S. at 32-33, 111 S.Ct. at 326.

It is indeed illogical to permit a greater recovery when liability is without fault (unseaworthiness) than that provided by Congress in its considered judgment when liability is the result of fault (negligence under the Jones Act).

We will not repeat in this petition, the compelling language of this Court pertaining to its deference to Congress in this field and the need for uniformity within classes of maritime claimants. However, to allow prejudgment interest when liability is based on judicially created cause of action without fault when Congress has not allowed such a recovery when liability is based on negligence is diametrically opposed to the expression of this Court in *Miles* and, it is respectfully submitted, is inconsistent with this Court's place in the constitutional scheme.

5. The snapshot in time argument used to justify the award of prejudgment interest is unfounded as the argument's underlying authority actually supports MOC's position.

It has been argued many times in the lower courts that it is inappropriate for courts to supplement the damages available under the Jones Act with an award of prejudgment interest using the general maritime law. By and large, the lower courts have failed even to address the argument urged herein, broadly holding only that the general maritime law permits the recovery of prejudgment interest. The sole lower court, as far as petitioners are aware, to address the *Miles* uniformity principle argument with regard to the recovery of prejudgment interest was the United States District Court for the Eastern District of Louisiana in *Anglada v. Tidewater Inc.*, 752 F.Supp. 722 (E.D.La. 1990). In *Anglada*, the court held that, since the availability of prejudgment interest on a general maritime law claim existed prior to the passage of the Jones Act in 1920, such an award was not affected by the Jones

Act or the *Miles* decision (the "snapshot in time" argument). Specifically, after correctly holding that *Miles* barred Mrs. Anglada's claim for loss of consortium, the court held:

> *Apex Marine*, however, appears to have no effect on Mr. Anglada's request for prejudgment interest. Awards of prejudgment interest on general maritime law claims, unlike damage awards for loss of society or consortium, were recognized under general maritime law long before the birth of the Jones Act, and were not the result of a mistaken extension of Supreme Court decisions. *See The Scotland*, 118 U.S. 507, 518, 30 L.Ed. 153, 6 S.Ct. 1174 (1886) (award of prejudgment interest within the discretion of the trial court); *The President Madison*, 91 F.2d 835 (9th Cir. 1937) (citing 19th century cases such as *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 4 L.Ed. 456 (1817) in support of its decision to award prejudgment interest); *Thompson Towing & Wrecking Association v. McGregor*, 207 F. 209, 220-222 (6th Cir. 1913).

Anglada, 752 F.Supp. at 725.

MOC suggests the snapshot in time argument and the cases cited in *Anglada* actually support MOC's argument that prejudgment interest should not be available to a Jones Act seaman no matter what vehicle he uses to recover damages. Two of the cases on which the *Anglada* court relied, *The Scotland* and *The President Madison*, were cases involving solely property damage. MOC does not contend that prejudgment interest cannot be recovered in property damage cases brought in admiralty, but rather that it is not available in personal injury cases involving Jones Act seamen. The third case relied on by the *Anglada*

court, *Thompson Towing & Wrecking Association v. McGregor*, was a personal injury case, in which the court supplemented the general maritime law, using Michigan state law to support an award of prejudgment interest. This "supplementation" is *exactly* what this Court rejected, with respect to analogous FELA claims, in *Monessen*.

Even *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546 (1818), which formed the support for *The President Madison*, 91 F.2d 835 (9th Cir. 1937), cited by the *Anglada* court, actually supports petitioners' position. *The Amiable Nancy* was a prize case, involving, among other issues, a suit to recover damages for property stolen from and personal injuries received by the crew of the vessel AMIABLE NANCY. The appellate court awarded the crew both damages to replace the items "plundered" from them, and damages for the personal injuries they sustained. However, the court specifically awarded interest on only the property damage award, not the personal injury award.

The law was clear prior to 1920, that prejudgment interest was not available in admiralty suits for personal injury.

> While damages for loss or injury to property or for the non-payment of money may, in the discretion of the Court, be compensated in admiralty by the allowance of interest . . . , in cases of tort for personal injuries, interest is not allowable until the extent of the damages is judicially ascertained.

The ARGO, 210 F. 872, 875 (9th Cir. 1914) (citations omitted). *See also Union Steamboat Company v. Fitzgibbons*, 261

F. 768, 770 (7th Cir. 1919) (prevailing rule in tort claims for personal injury is that interest is not allowable until damages are liquidated).

Thus, at the time the Jones Act was passed, prejudgment interest was *not* available in admiralty suits for personal injury. The assumption that Congress is aware of existing law when it passes legislation, *Cannon v. University of Chicago*, 441 U.S. 677, 696-97, 99 S.Ct. 1946, 1957-58 (1979), used in judicial interpretation of legislative intent, leads to the conclusion that in passing the Jones Act, Congress intended to prohibit the recovery of prejudgment interest. Just as this Court held in *Monessen* that state law cannot be used to supplement the award of damages in a FELA case to permit the recovery of prejudgment interest, this Court should hold that the general maritime law may not be used to supplement the award of damages in a Jones Act case to permit the recovery of prejudgment interest.

6. There is a split in the federal circuits and thus lack of uniformity as to when a Jones Act Seaman is entitled to prejudgment interest.

The law in this area is a hodgepodge, and a definitive, acknowledged and intentional split in the circuits has existed for eight years, with no indication of the circuits resolving the split without intervention by this Court. This lack of uniformity dramatically affects the type and amount of damages in seaman's cases awarded from state to state and circuit to circuit and is contrary to the principle of uniformity in admiralty so frequently espoused by this Court, *e.g., Miles, supra, Higginbotham,*

supra, and *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 209, 106 S.Ct. 2485, 2487 (1986).

To summarize, in the Fifth Circuit, if an accident is caused by Jones Act negligence and the action is brought "at law," prejudgment interest is not allowed. *Domangue v. Penrod Drilling Corp.*, 748 F.2d 999, 1000 (5th Cir. 1984). If that same action is brought "in admiralty," prejudgment interest is allowed. *Williams v. Reading & Bates Drilling Co.*, 750 F.2d 487 (5th Cir. 1985). If there is evidence of both negligence and unseaworthiness and the causes can be logically separated, in the Fifth Circuit, in a case at law, prejudgment interest can be awarded only on that portion of the damages specifically attributable to unseaworthiness. *McPhillamy, supra*. On the other hand, if the causes of the damage cannot be segregated logically, prejudgment interest is not allowed at all. *Id.* Louisiana generally follows the Fifth Circuit's jurisprudence on this issue as does the Sixth Circuit. *Marsh v. Penrod Drilling Co.*, 619 So.2d 1124 (La. App. 4th Cir. 1953), *writ den.*, 625 So.2d 180, *cert. den.*, 114 S.Ct. 1068, 510 U.S. 1118; *Petersen, supra*.

On the other hand, the Second Circuit follows the Fifth Circuit's jurisprudence pertaining to allowing prejudgment interest in actions in admiralty but not in actions at law. However, and directly contrary to the Fifth and Sixth Circuits, the Second Circuit allows prejudgment even if there is no logical way to differentiate the cause of the loss as between negligence and unseaworthiness. *Magee*, 976 F.2d at 822. ("However with all due respect for our learned colleagues in these two circuits, we reach a different conclusion in the instant case.")

In the instant case, the jury found plaintiff's accident was caused equally by the negligence of MOC and by the unseaworthiness of the M/V OVERSEAS ALASKA. While it is true that there was evidence to support a finding of either negligence, unseaworthiness, or both, there was no basis to divide the damages resulting from this accident, as there was a single incident resulting in a single harm. In the Fifth Circuit, the jurisprudence is clear, where there is no basis for distinguishing between the damages resulting from Jones Act negligence and those resulting from unseaworthiness, prejudgment interest cannot be awarded. *McPhillamy*, 810 F.2d at 532. "Only if there is an evidentiary footing for separating the damages caused by unseaworthiness and Jones Act negligence can the jury be asked to do so." *Id.* If there is no realistic basis for apportioning damages, plaintiff is not entitled to an apportionment. As the Fifth Circuit has noted:

> Usually, a plaintiff who seeks recovery under the Jones Act and general maritime law for injuries sustained in a single accident has no basis for apportioning his damages between each theory of recovery. The trial court may exercise its discretion to award prejudgment interest only when a pure admiralty item of damages – such as damages caused by unseaworthiness – can be isolated and thus identified in the verdict. In the absence of such a determination, no prejudgment interest may be awarded.

Domangue v. Penrod Drilling Co., 748 F.2d 999, 1001, n.1 (5th Cir. 1985).

In the instant case, although the jury did provide an apportionment, the apportionment is not supported by any evidence. Plaintiff was injured as the result of a

single slip on board the M/V OVERSEAS ALASKA due to the accumulation of soot and moisture on top of the boiler on which he was working. This resulted in a single harm from a single cause. There is no basis for determining what portion of this condition or Selico's injuries was caused by unseaworthiness and what portion was caused by Jones Act negligence. Accordingly, under properly applied Fifth Circuit jurisprudence, no prejudgment interest should have been awarded in this instance.[6]

The Louisiana state courts below did not properly apply the Fifth Circuit rule, but instead allowed the jury to apportion damages between unseaworthiness and negligence, although there was no evidentiary basis on which to do so. Accordingly, prejudgment interest was allowed on 50% of the damages awarded by the state court.

If this same case had been tried at law in the Second Circuit, as there was a single harm from a single cause based upon both negligence and unseaworthiness, the Second Circuit would have allowed prejudgment interest on 100% of the damages.

If the case had been tried in admiralty in either the Fifth or Second Circuits, both would allow prejudgment interest on 100% of the damages despite what petitioners see as a Congressional prohibition of awarding prejudgment interest in Jones Act cases under any circumstances. As state courts have no admiralty jurisdiction, such an award would be clearly improper in state court.

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[6] Strangely, under Fifth Circuit jurisprudence, if there was no negligence, but solely the existence of the unseaworthy condition, then prejudgment interest would have been allowed.

Therefore, it appears that there are at least three damage scenarios – 1) 100% prejudgment interest, 2) prejudgment interest only on the unseaworthiness claim or 3) no prejudgment interest at all – depending on 1) in which court, federal or state, 2) on which side of the federal court, at law or in admiralty, and 3) in which U.S. circuit, Fifth and Sixth on one hand and Second on the other, the suit is filed.

CONCLUSION

We do sail in occupied waters here. Unfortunately, these waters, rather than being smoothly settled by uniform maritime law, following the dictates of the appropriate Congressional enactment, are roiled by inconsistency, illogical reasoning, uncertainty and a complete absence of the laudable and calming goal of uniformity. There is no reason for this situation to obtain in view of Congressional enactment and this Court's clear guidance in *Miles* and its clear and direct instruction in *Monessen*. But, unfortunately, all that is quite clear at this point is that these navigational aids are being ignored and that the lower courts only can be put on the correct course by the intervention of this Court and the exercise of its appropriate authority.

It is respectfully submitted that in order to vindicate the goals of uniformity, logic in the law, and the proper deference to Congressional enactments, this Court should grant this petition for writ of *certiorari* and decide

whether Jones Act seamen should be entitled to prejudgment interest when liability is based on unseaworthiness and to address and resolve the split in the circuits.

Respectfully submitted,

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APPENDIX A

LEE SELICO	*	**NO. 98-CA-0763**
VERSUS	*	**COURT OF APPEAL**
INTERCONTINENTAL BULKTANK CORPORATION, ET AL.	*	**FOURTH CIRCUIT STATE OF LOUISIANA**

* * *

APPEAL FROM
CIVIL DISTRICT COURT FOR THE
PARISH OF ORLEANS
NO. 89-898, DIVISION "N"–8
HONORABLE ETHEL SIMMS JULIEN, JUDGE

* * *

PATRICIA RIVET MURRAY
JUDGE

* * *

(Court composed of Judge William H. Byrnes III, Judge Steven R. Plotkin and Judge Patricia Rivet Murray)

BYRNES J., CONCURS WITH REASONS

PLOTKIN J., DISSENTS IN PART WITH WRITTEN REASONS

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MAY 12 1999

AFFIRMED

International Bulktank Corporation and Maritime Overseas Corporation appeal a judgment in favor of seaman Lee Selico based on negligence and unseaworthiness as well as a judgment notwithstanding the verdict awarding Mr. Selico pre-judgment interest on the award for damages caused by unseaworthiness. We affirm.

FACTS:

On May 28, 1987, Lee Selico, a merchant seaman, was employed by International Bulktank Corporation (IBC) aboard the M/V Overseas Alaska, a steam tanker, as a "deck engine utility." On that date the ship was docked in the port of New Orleans undergoing an annual coast guard inspection. Mr. Selico was working in the engine room under the supervision of the first and second assistant engineers while the coast guard officers were inspecting the boiler. He had followed the second assistant engineer, as instructed, to the top of the boiler in order to put a "gag" on the steam valve so that the boiler could be raised to capacity in order to be inspected. Mr.

Selico and the engineer had climbed a catwalk onto the slanted side of the boiler, and Mr. Selico followed in order to assist him. The engineer realized that he needed more tools in order to complete gagging off the valve, and asked Mr. Selico to return to the machine shop for them. Mr. Selico testified that he turned around and went back the way he had come, but he slipped and lost his footing. He reached for the hand railing in order to catch himself, and pulled his shoulder out of place. The second engineer picked him up vertically, and stood him on the catwalk, then called for the first engineer who helped get Mr. Selico to the lower engine room where they were able to work his shoulder back into place with some effort after approximately a half hour. Mr. Selico testified that his fall was caused by a combination of the slant of the top of the boiler and the build-up of soot and moisture on its surface.

When asked by the medical officer, who had been called by the engineer, if he wanted to continue working, Mr. Selico replied that he needed to keep his job. He indicated to the officer that he did not need to see a doctor at that time. He testified that he was told that he should ask for treatment later if he felt it was needed.

Mr. Selico continued to work for approximately two weeks. Although he was not doing anything too strenuous, he continued to have problems with his shoulder, which remained sore. On approximately June 14 or 15 Mr. Selico was working in the engine room, and reached for some tools. When he did so he felt as if his shoulder was going to come out of place again, and realized that he needed medical attention. He advised the mate that it did not appear that his shoulder was getting better from the

injury on May 28, and he asked to see a doctor. The mate filled out a requisition for medical attention, and Mr. Selico was taken to a doctor in New York. Mr. Selico gave the doctor the history of the accident on May 28. He also gave a history of a football injury to his shoulder in high school, as well as two or three other occasions when his shoulder "popped out" out [sic] of place, the most recent having occurred approximately two years before this accident. Following an examination and x-ray, the doctor determined that Mr. Selico was not fit for duty. Mr. Selico returned to the ship, and arrangements were made for him to return to New Orleans.

On June 19, following his return to New Orleans, Mr. Selico consulted Dr. Walter Brent, an orthopedic surgeon. Dr. Brent diagnosed a dislocating left shoulder. He was of the opinion that Mr. Selico had a severe rotator cuff injury, and recommended surgery to form a new anterior part of the rotator cuff. As Dr. Brent explained, the procedure would involve exposing the shoulder joint, taking out the labrum (cartilage attached anteriorly), freshening the bone on the anterior of the labrum, and placing the glenoid cavity of the shoulder joint tightly on the "freshened up" bone so that it would heal in this position. He also recommended that the muscles be plicated back and tightened slightly in front of this area.

Dr. Brent performed the surgery on June 25. The surgery disclosed that the anterior capsule and the labrum were completely torn from the anterior part of the attachment of the glenoid, which Dr. Brent found was consistent with trauma caused by a recent injury. In his opinion this most likely happened as Mr. Selico grabbed

onto something and received a severe jerk when he attempted to break his fall in the engine room.

Mr. Selico remained in the hospital for nine days and was seen by Dr. Brent on several occasions following his discharge. He began physical therapy in mid-July and was discharged by Dr. Brent on November 9, 1987. At that time Mr. Selico lacked approximately fifteen degrees external rotation and approximately five degrees internal rotation of the shoulder. Dr. Brent felt that this was an excellent result. Although he assigned a ten percent partial disability of the upper extremity, he opined that Mr. Selico could return to his work as a merchant seaman. Mr. Selico returned to this work on December 6, 1987.

Following testimony by Mr. Selico and Dr. Brent, and the introduction of various exhibits, the plaintiff rested. The trial court denied a defense motion for directed verdict. The defendants then rested without calling any witnesses.

The jury answered interrogatories finding that: the Alaska was unseaworthy on May 28, 1987, and the unseaworthiness was a proximate cause of injuries to Mr. Selico; that Maritime Overseas Corporation and International Continental Bulktank Corporation were negligent on May 28, 1987, and their negligence contributed to the injury sustained by Mr. Selico; that 50% of Mr. Selico's injuries were attributable to unseaworthiness and 50% to negligence; that Mr. Selico's lost wages were $17,845.01, and his past, present and future suffering, disability, mental anguish and loss of capacity for enjoyment of life was $125,000.00; that he was not negligent in a manner

that contributed to his injuries; and that Mr. Selico was not entitled to recover pre-judgment interest.

The court entered judgment in accordance with the verdict on October 17, 1997. On December 19, 1997, the court granted Plaintiff's Motion for Judgment Not Withstanding the Verdict and awarded pre-judgment interest as to one-half of the lost wage award and one-half of the damage award.

The defendants have appealed assigning three errors by the trial court: 1) the court erred in awarding plaintiff pre-judgment interest; 2) the jury's findings of negligence and unseaworthiness are not supported by the evidence; and 3) the jury erred when it failed to find Mr. Selico to be contributorily negligent.

DISCUSSION:

Defendants do not take issue with the charges given the jury, but contend that the evidence does not support the findings of negligence and unseaworthiness. They argue that the only evidence presented by the plaintiff on these issues was that the top of the boiler was slanted and that there was moisture and soot on it, and these facts are not sufficient to carry the plaintiff's burden to prove either negligence or unseaworthiness. We disagree.

Mr. Selico testified that he was performing a task that he had never done before, gagging the safety valves on the top of the boiler, under the supervision of his superior officers. He testified that the boilers are approximately thirty feet above the deck of the engine room. The top of the boilers is a slanted surface that Mr. Selico had never been on prior to this accident. He testified that this was

not a normal work surface, and that the top of the boiler was not regularly cleaned. The surface had not been cleaned in order to make it a safe place to work prior to Mr. Selico's being taken, by his superior, to the top of the boiler to work on the valve. Mr. Selico testified that he inspected the top of the boiler as a result of questioning by defendants' attorney, and observed skid marks and footprints in the area where he had fallen; he had not seen anyone on top of the boiler from the date of his accident until he made his inspection. He concluded, therefore, that the skid marks and footprints were associated with his accident.

Defendants elected not to call any of the crew members who were present on May 28, 1987, when Mr. Selico slipped on the top of the boiler and caught himself, pulling his shoulder out of its socket. Instead, defendants cross-examined Mr. Selico with regard to his failure to mention the soot or moisture on the top of the boiler when he gave a statement to their counsel prior to leaving the ship in New York.

Under the general maritime law a vessel owner has an absolute duty to keep and maintain the ship, its decks, passageways, appliances, gear, tools and equipment in a seaworthy condition at all times. *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S.Ct. 926 (1960). A vessel is seaworthy if it and its appurtenances are reasonably fit for their intended use and its crew is reasonably adequate. If a vessel and its appurtenances are not safe and suitable for their intended use then the vessel is unseaworthy. *Id.* In order for a shipowner to be liable based on a claim of unseaworthiness a plaintiff must prove that the

unseaworthy condition was a substantial factor in causing his injury. *Foster v. Destin Trading Corp.*, 96-0803 (La. 5/30/97), 700 So.2d 199; *Pradarits v. Capital Towing Corp.*, 97-2077 (La. App. 4 Cir. 3/11/98), 710 So.2d 334.

The jury apparently believed Mr. Selico's testimony that his fall was caused by a combination of the soot and moisture on the top of the boiler and the fact that the surface upon which he was required to walk to perform the task assigned to him was slanted. It likewise appears to have accepted his explanation, on cross-examination, as to why he did not mention the soot and moisture in his statement to defendants' attorney. This was a credibility determination to be made by the jury, and we find that it is supported by the record. *Smith v. Two R Drilling Co., Inc.*, 606 So.2d 804, 808 (La. App. 4th Cir.), *writ denied* 607 So.2d 560 (La. 1992).

The top of the boiler was not fit to serve as a walkway or a work platform for a seaman assigned to perform the task to which Mr. Selico was assigned. The jury's conclusion that the Alaska was unseaworthy and that this condition was a contributing cause of Mr. Selico's injury is supported by the record and must be affirmed.

Likewise, the jury's finding of negligence is supported by the record and must be affirmed. Under the Jones Act, an employer has a duty to provide a seaman with a safe place to work. If it breaches that duty, and that breach plays a part in causing injury to the seaman, the employer is negligent. *See Foster, supra* at p. 3, 700 So.2d at 208.

Mr. Selico testified that the top of the boiler had never been cleaned and that he was following his superior officers' instructions as to the manner in which he should perform his job and the route that he should use to reach the work area. This is sufficient to support the jury's finding that his employer was negligent and that this negligence, as well as the unseaworthy condition of the vessel, contributed to Mr. Selico's injury.

Nor do we find that the jury erred when it found that Mr. Selico was not contributorily negligent. The law recognizes that a seaman does not have control of his working conditions, and must, to a certain extent, accept those conditions. He, therefore, is not required to devise a safer method for doing his assigned job or ask for additional or different equipment. *Youn v. Maritime Overseas Corp.*, 605 So.2d 187, 198 (La. App. 5 Cir. 1992), *judgment set aside in part on other grounds*, 623 So.2d 1257 (*citing Ceja v. Mike Hooks, Inc.*, 690 F.2d 1191, 1194 (5th Cir. 1982)). His obligation is to obey his superiors and do his work as he is instructed. *Id.* Mr. Selico testified that he was acting under the orders of the two superior officers who were supervising the "gagging" of the boiler during the Coast Guard inspection. There is absolutely no evidence to refute this testimony. Defendants, who had the burden to prove that Mr. Selico was negligent and his negligence contributed to his injury, offered nothing that would support a finding that Mr. Selico did anything other than follow the instructions of his superior officers.

The remaining error assigned addresses the award of pre-judgment interest. The trial court granted Mr. Selico's Motion for Judgment Notwithstanding the Verdict on this issue. Because the jury had not considered any evidence

as to future damages, and had found that one-half of Mr. Selico's damages was caused by the vessel's unseaworthiness and one-half caused by the defendants' negligence, the court awarded pre-judgment interest on one-half of the lost wage and damage awards.

A trial court's authority to grant a JNOV under Article 1811 of the Code of Civil Procedure "is limited by the jurisprudence to those cases where the jury's verdict is absolutely unsupported by any competent evidence." *Boudreaux v. Schwegmann Giant Supermarkets*, 585 So.2d 583, 586 (La. App. 4 Cir. 1991), *writs denied*, 590 So.2d 593, 595 (La. 1992). An appellate court reviewing the grant of a JNOV applies the same criteria used by the court below, as set forth in *Anderson v. New Orleans Public Service*, 583 So.2d 829, 832 (La. 1991):

> A JNOV is warranted when the facts and inferences point so strongly and overwhelmingly in favor of one party that the court believes that reasonable men could not arrive at a contrary verdict. The motion should be granted only when the evidence points so strongly in favor of the moving party that reasonable men could not reach different conclusions, not merely when there is a preponderance of evidence for the mover. . . . In making this determination, the court should not evaluate the credibility of the witnesses, and all reasonable inferences or factual questions should be resolved in favor of the non-moving party.

Pre-judgment interest compensates a plaintiff for the use of money that his employer owed him in connection with its duty under the general maritime law to provide him with maintenance and cure, and is applicable to

awards for past injuries only. *Verdin v. C & B Boat Co., Inc.*, 860 F.2d 150, 158 (5th Cir. 1988). Pre-judgment interest is not available for awards for negligence under the Jones Act. *Ellender v. Texaco*, 425 So.2d 291, 296 (La. App. 3 Cir. 1982).

The award of prejudgment is appropriate where such an award is necessary to "maintain whole the damages granted a claimant." *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55 (5 Cir. 1981), citing *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5 Cir. 1966), *cert. denied* 385 U.S. 1020, 87 S.Ct. 731 (1967). The award of prejudgment interest under the general maritime law is committed to the trial court's discretion. *Mitsui & Co., Ltd. v. American Export Lines, Inc.*, 636 F.2d 807, 823 (2 Cir. 1981); *Smith v. Two "R" Drilling Co., Inc.*, 606 So.2d 804, 815 (La. App. 4 Cir. 1992). As noted by the Second Circuit, the cases dealing with this element of damage have shown that the factfinder's discretion is a "legal discretion, and the award is to be made whenever damages lawfully due are withheld, unless there are exceptional circumstances to justify the refusal." *The Wright*, 109 F.2d 699, 702; also see *Mitsui, supra* at 823. This "limit" on the factfinder's discretion is a recognition that the "law's delay" may be used by a defendant as leverage in obtaining a more favorable settlement. *Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2 Cir. 1961), *cert. denied* 368 U.S. 989, 82 S.Ct. 606 (1962). Even if the defendant ultimately cast in judgment has not deliberately prolonged the litigation, he has had the use of the money he is declared to owe. It, therefore, would be "inequitable not to make appropriate compensation for delay in discharging the obligation." *Id.*

There is absolutely no evidence in this record of "exceptional circumstances" that would support the jury's refusal to award pre-judgment interest to Mr. Selico. The jury's determination that the Alaska's unseaworthiness and the defendants' negligence contributed equally to Mr. Selico's injury is a reasonable one, and is supported by the evidence. Finally, because the jury was presented with no evidence regarding future damages, its award necessarily must be based on past damages.

We find, therefore, that the JNOV granted with regard to the denial of pre-judgment interest was proper. We also find that the trial court did not err when it awarded pre-judgment interest on one-half of the awards for lost wages and damages, the portion attributed by the fact-finder to the claim under the general maritime law.

AFFIRMED.

BYRNES J., CONCURS WITH REASONS.

I agree with the majority opinion in its entirety. I concur for the sole purpose of restating a point already made in the majority opinion. Therefore, the fact that I concur should not be construed as an indication that anything in the majority opinion is not the opinion of a majority of this panel.

The fact finder has the discretion to deny pre-judgment interest from the date of loss only where there are "peculiar circumstances" that would make it inequitable for the losing party to be forced to pay pre-judgment

interest. *Lewis v. Maritime Overseas Corp.*, 98-0437, p.5 (La. App. 4 Cir. 11/10/98), 723 So.2d 1001, 1004.

In other words, ***as a matter of law,*** in the absence of "peculiar circumstances" the fact finder has no discretionary authority to deny pre-judgment interest. Conversely, the existence of "peculiar circumstances" is a prerequisite to the exercise of the discretionary authority to deny pre-judgment interest. The dissent points to no "peculiar circumstances." I find none in the record. Therefore, as a matter of law, it was error for the jury to deny pre-judgment interest.

Smith v. Two R. Drilling Co., Inc., 606 So.2d 804, 815 (La. App. 4 Cir. 1992) holds that where there is a jury, if the issue of pre-judgment interest is to be considered, it must be presented to the jury. Under *Smith*, in a jury trial the trial judge may not award pre-judgment interest without first submitting the question to the jury. However, nothing in *Smith* prevents the trial judge from reviewing a jury's denial of pre-judgment interest under the same JNOV standards as are applied to any other finding by the jury. There is no authority exempting a jury's denial of pre-judgment interest from JNOV review.

PLOTKIN, J., DISSENTS IN PART WITH WRITTEN REASONS:

To the extent the majority affirms the trial court's granting of a judgment notwithstanding the verdict

("JNOV") on the prejudgment interest issue, I respectfully dissent because it conflicts with this court's previous jurisprudence on that issue.

Under general maritime law, the award of prejudgment interest is subject to "the discretion of the trier of fact." *Smith v. Two "R" Drilling Co., Inc.*, 606 So.2d 804, 815 (La. App. 4 Cir. 1992). In *Smith*, this court reversed a trial court's decision to grant prejudgment interest in a case tried by a jury, where the prejudgment interest issue was not submitted to the jury. *Id.* The court stated that the question of prejudgment interest must go to the jury, and held that the plaintiff waived any right to prejudgment interest when he failed to request that the issue be presented to the jury. *Id.* In fact, this court said, "[t]he trial judge, as he was not the trier of fact, had no authority to grant an award of prejudgment interest." *Id.*

In the instant case, the issue of prejudgment interest was submitted to the jury; the jury denied the plaintiff any recovery on this issue. The record shows clearly that the issue of pre-judgment issue was disputed in the trial court. Moreover, the jury interrogatories indicate that the jury understood the issue and made a specific finding that Mr. Selico was not entitled to pre-judgment interest. The other interrogatories indicate that the jury had the ability to separate the issues. Under the circumstances, the jury's denial of pre-judgment interest was obviously a considered decision made in the exercise of the discretion of the trier of fact.

As noted by the majority, a motion for JNOV should be granted only "when the facts and inferences point so strongly and overwhelmingly in favor of one party that

the court believes that reasonable men could not arrive at a contrary verdict." *Anderson v. New Orleans Public Service*, 583 So.2d 829, 832 (La. 1991). Given the well-settled principle that prejudgment interest is subject to the discretion of the fact finder, it is apparent that reasonable men *could* arrive at a contrary verdict. Otherwise, the award of pre-judgment interest would be mandatory, rather than discretionary. I believe the trial judge usurped the jury's position in granting the JNOV. Because the legal requirements for granting a JNOV were not present in this case, the trial court improperly granted the JNOV.

I would reverse the JNOV on the prejudgment interest issue and amend the award to delete the prejudgment interest. In all other respects, I agree with the majority's decision to affirm the trial court judgment.

APPENDIX B

Civil District Court for the Parish of Orleans
State of Louisiana
Division *"N"*

No. 89-898 **Section *8***

Lee Selico
versus
Intercontinenal [sic] ***Bulktank Corp.***
And Maritime Overseas Corporation

Filed:_____ _____
Deputy Clerk

JUDGMENT AND REASONS

This matter came for hearing via memoranda for a Judgment Not Withstanding the Verdict on the issue of Pre-Judgment Interest.

Memoranda were submitted by:

Walter Steinman, Attorney for Lee Selico.

G. Beauregard Gelpi, Attorney for Intercontinenal [sic] Bulktank Corp. and Maritime Overseas Corporation.

After reviewing the memoranda and the law, the court finds that **IT IS ORDERED, ADJUDGED, AND DECREED THAT** Plaintiff's Motion for a Judgment Not Withstanding the Verdict on the Issue of Prejudgment interest is ***GRANTED*** as to ½ of the lost wage award and ½ of the damages award.

Background

A jury trial was held in the matter on September 30, 1997, with judgment entered by the Court on October 17,

1997. The jury found for Mr. Selico, awarding him $ 17,485.01 in past wage losses and $ 125,000.00 in past, present, an [sic] future suffering, disability, mental anguish, and loss of capacity for the enjoyment of life. The jury interrogatories were answered as follows: That the SS OVERSEAS ALASKA was unseaworthy; that the unseaworthiness was the proximate cause of Mr. Selico's injuries; that defendants Intercontinental Bulktank Corp. and Maritime Overseas Corporation were negligent; that Mr. Selico was not negligent; and that the jury award was apportioned equally to the unseaworthiness of the vessel and the negligence of the defendants. The jury answered interrogatory number three, "Do you find from a preponderance of the evidence that the Plaintiff is entitled to recover pre-judgment interest in this action?" in the negative. It is the jury's determination to deny prejudgment interest which is the subject of this motion.

Analysis

Prejudgment interest may be awarded to compensate the plaintiff for the use of the money to which his employer justly owed him due to the employer's strict maintenance and cure duty. It is only available for awards concerning past injuries. ***Verdin v. C&B Boat Co., Inc.***, 860 So.2d 150, 158 (5th Cir. 1988). Prejudgment interest is normally awarded, absent some fault of the plaintiff or some compelling reasons to deny the interest. ***Magee v. United States Lines***, 976 F.2d 821, 1993 AMC 159 (2nd Cir. 1992); ***Melancon v. Petrostar Corp.***, 762 F.Supp. 1261, 1992 AMC 521 (W.D. La. 1991).

Prejudgment interest stems solely from the admiralty and maritime jurisdiction of the federal court. It is available for general maritime law claims. The waters become more murky for Jones Act claims. The Jones Act plaintiff can plot a course through the "law" side of federal court, where a jury can determine his fate or, he can navigate through the "maritime" side of the court, and steam through a bench trial. If on the maritime side of the court, prejudgment interest would be available; if on the law side of the court, prejudgment interest is precluded. ***Ellender v. Texaco***, 425 So.2d 291, 298 (La. App. 3 Cir. 1982) (*reh'g den.*); ***Marsh v. Penrod Drilling Co.***, 619 So.2d 1124 (La. App. 4 Cir. 1993).

Thus, Plaintiffs bringing claims in state court under the "savings to suitors" clause may receive prejudgment interest on their general maritime law claim for unseaworthiness, but not on their Jones Act claim for negligence because that Jones Act claim was brought before a jury. ***Ellender***, 425 So.2d 291, 296.

In the present case, the Jury allocated fault, determining that Mr. Selico's injuries were equally due to his employer's negligence and the unseaworthiness of the vessel. The jury denied prejudgment interest on the unseaworthiness award, however. In ***Marsh***, the Fourth Circuit indicates that prejudgment interest may not be awarded by the court when not considered by the jury. The Court stated:

> In this case the jury received no instructions and no evidence was presented concerning prejudgment interest. Additionally, the jury interrogatories did not address prejudgment interest. In *Ellender*, 425 So.2d at 291, the trial court's denial

> of prejudgment interests under similar facts was affirmed.

619 So.2d 1124, 1125. Were this a bench trial, the court could review its judgment and determine apportion the award between past and future damages. ***Martin v. Walk, Haydel & Assoc.***, 794 F.2d 209, 212 (5th Cir. 1986). In a jury trial, such a reapportionment is within the court's discretion. As the Federal Fifth Circuit stated in ***Brister v. A.W.I., Inc.***, 946 F.2d 350

> The record does not show that Brister objected to the verdict form, which made no distinction between past and future damages. We find that the district court acted within its discretion in refusing to grant prejudgment interest to all or any portion of the jury's lump sum damages award. Although it is clear that some part of the original award was for past damages, the district court was not compelled to speculate as to how the jury would have apportioned the damages if it had been asked to do so.

946 F.2d 350, 362. Finally, as the ***Marsh*** panel concluded:

> In the instant case, the damages were awarded in a lump sum, with no indication of the amount awarded for each element of damages. When prejudgment interest is improperly awarded in a lump sum award with undifferentiated elements of damages, the award of interest must be reversed in its entirety.

619 So.2d 1124, 1125. ***Marsh*** would not be controlling, however, if the jury had only considered evidence as to past damages. The Selico jury did not consider evidence as to future damages, so the entirity [sic] of the unseaworthiness award must, by its very nature, be for

past damages. As such, the Court feels that it is appropriate to grant the JNOV as to the issue of prejudgment interests. This interest, as states, only applies to one-half of the lost wages and damages, as the jury found fault to be equally caused by unseaworthiness and Jones Act negligence.

Therefore, it is hereby **ORDERED, ADJUDGED AND DECREED THAT** Plaintiff's Motion for a Judgment Not Withstanding the Verdict on the Issue of Prejudgment interest is ***GRANTED*** as to 1/2 of the lost wage award and 1/2 of the damages award.

Signed at New Orleans, Louisiana, this 19th day of December, 1997.

/s/ Ethel S. Julien
ETHEL SIMMS JULIEN
Judge, Civil District Court

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/s/ Illegible
DEPUTY CLERK, CIVIL
DISTRICT COURT
PARISH OF ORLEANS
STATE OF LA.

APPENDIX C

The Supreme Court of the State of Louisiana

LEE SELICO

VS. NO. 99-C – 1713

INTERCONTINENTAL BULKTANK CORPORATION, ET AL

IN RE: Intercontinental Bulktank Corp. – Defendant(s); Applying for Writ of Certiorari and/or Review; Parish of Orleans Civil District Court Div. "N" Number 89-898; to the Court of Appeal, Fourth Circuit, Number 98-CA-0763

September 24, 1999

Denied.

CDK
PFC
BJJ
JPV
CDT
JTK

MARCUS, J. would grant the writ.

LEMMON, J. not on panel.

Supreme Court of Louisiana
September 24, 1999

/s/ Rai L. Daigle
Deputy, Clerk of Court
For the Court

No. 99-1067

In The

Supreme Court of the United States

INTERCONTINENTAL BULKTANK CORPORATION and MARITIME OVERSEAS CORPORATION,

Petitioners,

versus

LEE SELICO,

Respondent.

On Petition For Writ Of Certiorari To The Louisiana Court Of Appeal For The Fourth Circuit

BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED

1. The General Maritime Law of the United States recognizes the right of plaintiff, who was a seaman injured in an accident which the jury found was caused by the unseaworthiness of the defendants' vessel, to recover prejudgment interest on the portion of the award caused by such unseaworthiness. Congress has not addressed this issue and the Jones Act is not the exclusive remedy for injured seamen.

2. There is no split in the circuit courts in cases such as the present one in which prejudgment interest was awarded by the jury, pursuant to a specific jury interrogatory, solely on the portion of their award caused by the unseaworthiness of defendants' vessel. Every circuit court would have rendered the exact same verdict.

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STATEMENT OF THE CASE

This matter involves serious shoulder injuries suffered by plaintiff, Lee Selico, a merchant seaman employed by the defendants on their vessel, the SS OVERSEAS ALASKA, as a result of an accident which occurred on May 28, 1987. (App. A., App. p. 2a). The accident occurred while plaintiff was working in the engine room with his immediate supervisor, the Second Engineer, in a dangerous area located on top of the starboard boiler of the vessel, and he was injured while following the direct orders of this supervisor. As a result of this injury plaintiff was required to seek medical treatment, which revealed sufficient damage to his shoulder that it required surgical repair. (App. A, App. p. 4a).

Plaintiff thereafter filed suit against the defendants, asserting an unseaworthiness claim under the General Maritime Law of the United States and a negligence claim under the Jones Act, 46 U.S.C. § 688, *et seq.*, in the Civil District Court for the Parish of Orleans. The trial of this matter was conducted on September 30, 1997. During the trial, plaintiff testified concerning the cause of the accident and the extent of his injuries, he presented testimony of his treating physician and submitted extensive exhibits concerning the accident and his medical treatment. Defendants called no witnesses and only submitted exhibits relating to wage loss.

After receiving Jury Charges following the close of evidence, the jury returned a verdict in favor of plaintiff on all counts in the total amount of $142,845.01. They further found that the SS OVERSEAS ALASKA was unseaworthy and that defendants were negligent and, in

response to a specific jury interrogatory,[1] concluded that 50% of their award was based upon unseaworthiness and 50% of their award was based upon negligence.[2]

However, due to confusion on the part of the jury, in error they failed to award plaintiff prejudgment interest. Plaintiff therefore filed a Motion for Judgment Notwithstanding the Verdict Only on the Issue of the Failure of the Jury to Award Pre-Judgment Interest, seeking prejudgment interest solely on the portion of the award caused by the unseaworthiness of the SS OVERSEAS ALASKA. Defendants opposed this Motion generally on the same basis as presented in this Petition. The trial

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[1] A copy of the Jury Interrogatories have been attached as Appendix A, pp. 1a-3a. The specific Interrogatory in question is No. 6.

[2] Throughout their Petition the defendants have used the term "equally" to describe the jury's allocation of the award between unseaworthiness and negligence. While technically correct the use of this word may be misleading and not a proper representation of the jury's decision. While the percentage findings of unseaworthiness and negligence were the same amount, the defendants seem to imply that there was no real basis for the jury to allocate their award between the two theories and thus the award was not based on the evidence. This implication cannot be further from the truth as plaintiff presented ample evidence on which the jury was able to base their allocation, made in response to a specific jury interrogatory. The jury reviewed the uncontroverted evidence and made a factual determination of the cause of the accident, which they were not necessarily required to do. Had the jury been unable to allocate their award or concluded that the unseaworthiness of the vessel was more or less than 50% of the cause of the accident, plaintiff would likewise have no basis on which to object to the jury's decision.

court granted plaintiff's Motion and awarded prejudgment interest on $8,922.51 in past lost wages, which was one-half of the lost wage award, and on $62,500.00, which was one-half of the general damage award.

The defendants then appealed the entire verdict in this matter. On appeal, the Louisiana Fourth Circuit Court of Appeals affirmed the trial court's verdict,[3] including the trial court's granting of the JNOV on the issue of prejudgment interest, in its entirety. They held that the jury's determination that the vessel's unseaworthiness and defendants' negligence both contributed to plaintiff's accident was a reasonable decision and supported by the record. (Appendix A, App. pp. 7a-9a, 12a). They went on to dismiss every claim asserted by the defendants in the present Petition, specifically including their claim that prejudgment interest should not apply to awards under General Maritime Law for unseaworthiness.

The defendants then filed an application for writ of *certiorari* to the Supreme Court of Louisiana, seeking review of the same issues once again. On September 24, 1999, in a six to one vote, the Supreme Court of Louisiana denied defendants' writ application. (Appendix C, App. p. 21a).

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[3] Defendants point out that one member of the Louisiana Fourth Circuit Court of Appeals dissented to the decision. However, the member dissented only on the basis that the jury's failure to award prejudgment interest in this matter should not have been contested by the trial judge as it was a factual finding, he did not dissent with the panel's discussion concerning the right of the jury to award prejudgment interest in admiralty cases. (Appendix A, App. pp. 13a-15a).

REASONS FOR DENYING THE PETITION FOR WRIT OF *CERTIORARI*

The General Maritime Law of the United States has recognized the right to recover prejudgment interest in all actions, including in personal injury actions brought on the basis of unseaworthiness. Despite defendants' repeated reference to unrelated issues in an effort to mislead this Court into believing otherwise, there is not one single case which has refused to recognize this fact. The only argument stated by the defendants which is true on this issue concerns a limited situation which does not apply to the facts of this matter.

That lone situation involves an action where an injured seaman combines his unseaworthiness action with a negligence action brought pursuant to the Jones Act and the action is tried at law to a jury and the jury either is not asked whether to award prejudgment interest or they are unable to allocate their award between unseaworthiness and negligence. The reason why this situation is an exception to the general rule that prejudgment interest should be awarded in maritime actions is that in this situation, and in this situation only, Congress has addressed the issue.

In this matter, since the jury was asked to award prejudgment interest and they were able to determine that 50% of their award was based upon unseaworthiness, the granting of prejudgment interest on this portion of the verdict was allowed, if not required, to be awarded.[4] In an apparent attempt to persuade this Court

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[4] As stated by this Court in *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, 515 U.S. 189, 115 S.Ct. 2091, 2095, 132 L.Ed.2d

that this case falls under that one exception, defendants have distorted the evidence presented at trial, mischaracterized the lower courts' findings and, without directly stating so, seem to be asking this Court to review the factual determinations made by the jury.

The current state of the law in this area is so well-settled that the defendants themselves clearly concede that no court has ever accepted their argument. Furthermore, despite defendants' unsupported contentions to the contrary, there is no split in the circuit courts in situations such as the present one. Under the facts of this case which were presented at trial, and in the procedural posture of this case as it is before this Court, regardless of where this case could or would have been filed, every court, without exception, would have reached the exact same result. As such, the defendants Petition for Writ of *Certiorari* must be denied and they should be required to pay Mr. Selico the funds to which he has long been entitled.

1. The jury's allocation of their award between negligence and unseaworthiness, which is supported by the evidence presented at trial, is not subject to review by this Court.

While the defendants have not come out and directly asked the Court to review the jury's allocation of their

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148 (1995), prejudgment interest should be awarded absent "peculiar" or "exceptional" circumstances, none of which are present in this action. Therefore, once the issue of prejudgment interest was submitted to the jury, they were virtually required to award prejudgment interest on the portion of their award based on the unseaworthiness of the SS OVERSEAS ALASKA.

award between unseaworthiness and negligence, since such a review is clearly improper, they nevertheless make repeated claims that there was no basis for jury's liability allocation. We believe this is simply an attempt to make a veiled argument in the alternative.

Defendants' primary argument is that there can be no prejudgment interest in any maritime personal injury action. However, recognizing that there is no legal authority for this argument, they further assert the alternative argument that the jury's allocation was improper by distorting the facts of this case in an effort to fit it into the one exception to the granting of prejudgment interest in admiralty cases. Throughout their Petition, defendants continually refer to the jury's verdict in such a way as to have this Court believe that there was no evidence to support it. These repeated attempts by the defendants to mischaracterize the findings of the jury are improper and should be rejected by the Court. The jury was the sole factfinder in this matter and their decision, specifically including their liability allocation between unseaworthiness and negligence, should not be addressed by this Court. As this Court has previously held, in admiralty cases tried to a jury, the provisions of the Seventh Amendment[5] apply and require that the jury's findings not be disturbed on appeal. *See A. & G. Stevedores v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360 (1962); *International Terminal Operating Co., Inc. v. N. V. Nederk. Amerik Stoomv. Maats.*, 393 U.S. 74 (1968). As this Court also stated in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108, 114-115 (1963), *citing Tennant v. Peoria & P. U. R. Co.*, 321

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[5] U.S. Const. amend. VII.

U.S. 29, 35 (1960) in an action brought under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.*

> It is not the function of a court to search the record for conflicting circumstantial evidence in order to take the case away from the jury on a theory that the proof gives equal support to inconsistent and uncertain inferences. The focal point of judicial review is the reasonableness of the particular inference or conclusion drawn by the jury. It is the jury, not the court, which is the fact-finding body . . . That conclusion, whether it relates to negligence, causation or any other factual matter, cannot be ignored. Courts are not free to reweigh the evidence and set aside a jury verdict merely because the jury could have drawn different inferences or conclusions or because judges feel that other results are more reasonable.

As this limitation was further explained by this Court in *A. & G. Stevedores*, "neither we nor the Court of Appeals can redetermine the facts found by the jury any more than the District Court can predetermine them. For the Seventh Amendment says that 'no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.' " *A. & G. Stevedores* at 359.

During the trial of this matter plaintiff presented several separate and distinguishable negligent acts or defective conditions which could have caused his accident.[6] In response, the defendants presented no contradictory evidence and absolutely no testimony. The jury

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[6] The sufficiency of the facts and evidence presented to the jury was extensively examined and defendants' argument based

was then given proper instructions[7] concerning unseaworthiness and negligence and applied these charges to the facts of this case, rendering a verdict properly based on the evidence and testimony. The evidence presented at trial, including the testimony that plaintiff had been ordered by his supervisor to work in a dangerous area which was not a normal work surface, that this area was slanted and covered with soot and moisture which the defendants had allowed to accumulate, and that he was ordered by his supervisor, who was working with him on top of the boiler at the time of the accident, to climb off the boiler in order to retrieve additional tools, all supported the jury's findings that the accident was caused by a combination of the unseaworthiness of the SS OVERSEAS ALASKA and the negligence of the defendants. The uncontroverted testimony and evidence also provided the jury with sufficient evidence on which to support their separate apportionment of damages between the two causes of action.

The jury's findings were thereafter reviewed by the Louisiana Fourth Circuit Court of Appeals,[8] which

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thereon was rejected by the Louisiana Fourth Circuit Court of Appeals, as reflected in their decision reproduced in Appendix "A" to defendants' Petition, and as such will not be repeated here.

[7] No objection to the jury charges, instructions or jury interrogatories was made by the defendants at trial, in any appeal, or in this Petition.

[8] Under Louisiana Law, an appellant has the right to a *de novo* appeal of all issues raised in the trial court, including the findings of fact. *See* Rule 1-3 of the Louisiana Uniform Rules for the Courts of Appeal.

affirmed the findings in their entirety. The Louisiana Supreme Court subsequently denied defendants' Petition for *Certiorari*, further reinforcing the decision that the jury's findings were appropriate and not reviewable. Since the jury's findings have been properly reviewed by the Louisiana appellate courts, the basis for those factual findings is not subject to review by this Court. Therefore, the analysis of defendants' Petition must necessarily start with the established fact that 50% of Mr. Selico's damages were caused by the unseaworthiness of the SS OVERSEAS ALASKA.

2. Prejudgment interest is part of the damages to which an injured seaman is entitled under the General Maritime Law of the United States.

At least since this Court's decision in *Del Col v. Arnold*, 3 U.S. (3 Dall.) 333, 334 (1796),[9] admiralty and maritime courts have awarded prejudgment interest as part of the compensation to which an injured party is entitled. As stated in the most recent Supreme Court case on this issue, *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.* "[t]hroughout our history, admiralty decrees have included provisions for prejudgment interest." *City of Milwaukee* at 2095. Moreover, the award of prejudgment interest is "designed to make the plaintiff whole." *Monessen Southwestern Railway Co. v. Morgan*, 486 U.S. 330, 335, 108 S.Ct. 1837, 1843 (1988). As this Court stated in

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[9] *See also: The Umbria*, 166 U.S. 404, 421 (1796); *The Manitoba*, 122 U.S. 97, 101 (1887); *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 562-63 (1818); *The Anna Maria*, 15 U.S. (2 Wheat.) 327, 335 (1817).

City of Milwaukee, "the essential rationale for awarding prejudgment interest is to ensure that an injured party is fully compensated for its loss." *City of Milwaukee* at 2095. Furthermore, "prejudgment interest is not awarded as a penalty; it is merely an element of just compensation." *Id.* at 2096. As the lower court held in this matter, since the defendants had the use of the money they were found by the jury to owe, "[i]t . . . would be 'inequitable not to make appropriate compensation for delay in discharging the obligation." (Appendix A, App. p. 11a, *citing: Moore-McCormack Lines, Inc. v. Richardson*, 295 F.2d 583, 594 (2nd Cir. 1961), *cert. denied*, 368 U.S. 989, 82 S.Ct. 606 (1962)).

The underlying purpose for requiring that defendants pay prejudgment interest as part of the compensation they owe to an injured seaman is to encourage defendants to resolve litigation as soon as is possible and to promptly provide the injured worker with reimbursement for their injuries. As stated by Judge Blackmun in his dissent in *Monessen*, a rule such as that requested by the defendants against payment of prejudgment interest would create an incentive for the employer to stall the litigation and postpone the judgment as long as possible. *See Monessen* at 345 (Blackmun, J., dissent).

In addition, "an award of prejudgment interest helps achieve the goal of restoring a party to the condition it enjoyed before the injury occurred." *City of Milwaukee* at 2096. *See Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54, 55 (5th Cir. 1981); *Haynes v. Rederi A/S Aladdin*, 362 F.2d 345 (5th Cir. 1966), *cert. denied*, 385 U.S. 1020, 87 S.Ct. 731 (1967). As stated by the Seventh Circuit in *Hillier v. Southern Towing Co.*, 740 F.2d 582, 585 (7th Cir. 1984), "the

doctrine of *restititio in integrum* controls the determination of the appropriateness of the award of prejudgment interest. The doctrine of *restititio in integrum* provides that a plaintiff is to be placed in the position previously enjoyed prior to the time he or she sustained damages; the plaintiff is to be made whole, in monetary terms."

In this matter, the defendants arguably have had use of money rightfully owed to Mr. Selico since 1987, and they continue to have use of these funds. Prejudgment interest in this matter is based on the portion of the award attributed to unseaworthiness, that being $71,242.50, for the 10.4 years prior to trial. It should be noted, however, that under the market conditions as they have existed over the more than ten years during which defendants had use of these funds before trial, as well as during the two and one-half years they have had use of the funds since the verdict, even conservatively invested the funds would have generated significantly more than the amount of interest defendants owe as prejudgment interest. As a result, despite defendants' argument that this interest represents some sort of windfall, the defendants will clearly have earned a significant profit on the interim investment of plaintiff's funds.

Most importantly, by accepting defendants' position, this Honorable Court would abandon the beneficent policies which underlie the protections afforded seamen which have been fashioned by the Courts and Congress. Approval of defendants' argument would encourage callous employers to ignore injured employees and remove any encouragement to make their injured workers whole

as promptly as possible. Liability for prejudgment interest provides such encouragement by removing the incentive to delay the litigation.

3. Maritime law allows a court to award prejudgment interest when unseaworthiness is found by a jury.

Throughout their Petition, the defendants apparently have made the erroneous assumption that, since Mr. Selico qualifies as a "Jones Act seaman", the protections provided under the General Maritime Law of the United States do not apply equally to him. Apparently, the defendants base their entire argument against prejudgment interest around this incorrect assumption, citing to the 'uniformity principle' espoused in *Miles v. Apex Marine Corp.*, 498 U.S. 19, 111 S.Ct. 317 (1990), and its progeny.

In an attempt to convince this Court that their interpretation is correct, they present what they term a "syllogism" which states that "(1) Through its incorporation of FELA, the Jones Act does not allow prejudgment interest (at least when the action is at law). (citation omitted) (2) The courts cannot award a Jones Act seaman greater or different damages than are permitted by the Jones Act. (citation omitted); (3) Therefore, prejudgment interest is not allowed a Jones Act seaman whether his recovery is under the Jones Act or under the general maritime law" (Petition for Writ of *Certiorari* at 9-10.)

This "syllogism," however, is completely fallacious and, as such, leads to a gross misinterpretation of the law. Specifically, in order for this "syllogism" to work, one must first accept the assumption that, simply because

plaintiff qualifies as a Jones Act seaman, this status necessarily eliminates all other recovery on some basis other than the Jones Act with the incorporated FELA[10] law. This statement cannot be further from the truth.

The General Maritime Law of the United States existed well before either the FELA or the Jones Act were enacted. This law governed all incidents and accidents which occurred on the high seas and were directly fashioned from England's legacy of laws concerning shipboard accidents. In a further effort to assist injured seamen in recovering for the injuries caused by the negligence of their employers and the persons for whom they are responsible, for which an action under General Maritime Law did not exist at that time, Congress enacted the Jones Act. The Jones Act addressed this issue but was never designed to be the sole basis on which injured seamen could seek redress for their injuries.[11]

By incorporating FELA into the Jones Act, Congress was able to bring a tradition of laws which allowed an injured worker to sue for injuries caused by the negligence of a co-employee. However, a seaman is not a railroad worker. Since railroad workers never had the

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[10] Federal Employer's Liability Act, 45 U.S.C. § 51, *et seq.*

[11] "The Jones Act envinces no general hostility to recovery under maritime law. It does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness." (citations omitted). *Miles* at 29. *See Anglada v. Tidewater, Inc.*, 752 F.Supp. 722, 724 (E.D.La. 1990)["No scholar or court has ever intimated that adoption of the Jones Act indicates Congress intended to cast aside the general maritime law of unseaworthiness. . . . [i]t does not disturb seamen's general maritime claims for injuries resulting from unseaworthiness."]

separate ability to make a claim for unseaworthiness or to bring a claim for maintenance and cure, claims which are uniquely maritime in nature and which have always carried the right to recover prejudgment interest, these issues were never addressed by Congress when they incorporated FELA into the Jones Act. As such, the ability to make such claims under the General Maritime Law, and to collect prejudgment interest on such claims, continued after the enactment of the Jones Act and are not inconsistent with it. Accordingly, in addition to the right to bring an action under the Jones Act for injuries caused by the negligence of his employer or co-employees, unlike his railroad brethren an injured seaman also has the right to bring an action for injuries caused by the unseaworthiness of a vessel and can recover under either theory, or under both, depending upon the cause of the accident. Therefore, the Jones Act was designed merely to supplement the General Maritime Law and has never been considered by any court to override the protections provided under such laws. Any suggestions by the defendants to the contrary are patently wrong and should be rejected by this Honorable Court.

Furthermore, while it has been determined that *Miles* eliminated the recovery of prejudgment interest in cases based solely on the Jones Act which are tried at law to a jury, that issue is not before the Court in this matter. It is this exact failure of defendants to distinguish between recovery under the Jones Act and recovery under General Maritime Law which is the reason why their position is

patently incorrect and has never been accepted by any court.[12]

This same argument was presented unsuccessfully by the defendants in *Melancon v. Petrostar Corporation*, 762 F.Supp. 1261 (W.D.La. 1991). The defendants in the *Melancon* case, like the defendants here, argued that the Supreme Court's decision in *Miles* mandates dismissal of the plaintiff's claim for prejudgment interest under the General Maritime Law. *Melancon* at 1262. The court disagreed "with Petrostar's overly broad interpretation of the *Miles* decision." *Id.* The Court then held that "the *Miles* decision does not affect a seaman's right to obtain prejudgment interest where he has succeeded in proving his claim for unseaworthiness."[13] *Id.* at 1263.

The attempt to assert this same argument was also made in *Anglada v. Tidewater, Inc.*, by the same law firm which represents the defendants in the present matter. The court rejected the defendants' argument in that case, holding that "*Apex Marine*, however, appears to have no effect on Mr. Anglada's request for prejudgment interest." *Anglada* at 725. The court then referred to defendants' argument as "wishful thinking." *Id.* at 726. Finally, the court stated that:

> when Congress adopted the Jones Act, its purpose was to provide seamen with a remedy

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[12] "By and large, the lower courts have failed to even address the argument urged herein." (Petition for Writ of *Certiorari* at 12.)

[13] In a footnote the district court then cited to *Anglada v. Tidewater, Inc.*, stating that "we largely agree with the Anglada court's reasoning." *Anglada* at 1263, n. 2.

> against its employers for injuries caused by the negligent acts of fellow crew members. Congress did not intend to cast aside the remedies available to seamen under the general maritime law. It is worth repeating that *Apex Marine* explicitly declares, 'The Jones Act evinces no general hostility toward recovery under maritime law. It does not disturb the seamen's general maritime claims for injuries resulting from unseaworthiness.' Prejudgment interest predates the Jones Act. It is the Court's snapshot in time. Thus, it is beyond the reach of *Apex Marine*. (Citations omitted).

Id. at 726.

While defendants recognize that *Anglada* specifically addressed their arguments and dismissed them, they attempt to distinguish it by analyzing the cases cited by the *Anglada* court, including *The Scotland*, 118 U.S. 507, 30 L.Ed. 153, 6 S.Ct. 1174 (1886), *The President Madison*, 91 F.2d 835 (9th Cir. 1937), *Thompson Towing & Wrecking Association v. McGregor*, 207 F. 209 (6th Cir. 1913) and *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 562-63 (1818), incomprehensibly asserting that they support their arguments. However, even a minimal review of these cases reveals that defendants are misinterpreting them.

First, as for *The Scotland* and *The President Madison*, the defendants seem to argue that these cases do not support the *Anglada* court's decision as they involved only property damage, on which defendants agree that prejudgment interest is available. However, defendants fail to clearly state the underlying basis for the holdings in these cases. While these cases did not involve personal injury claims, they were both brought under the same

maritime law under which personal injury actions are brought. This law provides for recovery in personal injury cases and also provides for recovery of prejudgment interest. The *Anglada* court recognized this fact and properly awarded prejudgment interest.

In addition, in this Court's latest decision involving prejudgment interest in admiralty cases, *City of Milwaukee v. Cement Div., Nat'l Gypsum Co.*, which is not even addressed by the defendants, this Court did not limit its decision only to property damage cases. While it is true that the issue of prejudgment interest in personal injury actions was not before this Court in the *City of Milwaukee* case, the discussion of prejudgment interest as part of the General Maritime Law is directly analogous to personal injury actions. This decision clearly indicates that the awarding of prejudgment interest under the General Maritime Law is permitted and was proper in this matter.

As for the defendants' discussion of *The Amiable Nancy*, their attempts to distinguish it are likewise based on an improper reading of the case. First, the suit in that case was filed as the result of "the gross and wanton seizure of a Haitian vessel near the island of Antigua by the *Scourge*, an American privateer." *City of Milwaukee* at 2095, *quoting The Amiable Nancy* at 546-547, 558. While several of the crew on the vessel suffered personal injuries during the seizure, as the injuries were caused by the actions of persons from the privateer and not due to any condition of the vessel, no claim for unseaworthiness could have been made. In fact, the case did not involve an action against the injured seaman's employer but was instead filed against the owners of the American privateer. Second, while prejudgment interest was granted

on the property damage caused during the seizure, no claim for prejudgment interest on the personal injuries portion of the claim was ever made, nor is there a basis on which to determine if it was even submitted at the trial court. In addition, the issue of prejudgment interest on the injury portion of the case was not appealed to the circuit court and, as this Court specifically limited its review to whether the circuit court improperly rejected any items allowed by the district court,[14] this case did not even address the issue of prejudgment interest on the personal injury portion of the verdict. Therefore, since prejudgment interest in property damage cases has not, as discussed above, been limited only to such cases, the *Anglada* court's reliance on this case is justified.

Finally, the defendants follow their improper analysis of *The Amiable Nancy* with the completely erroneous statement that "[t]he law was clear prior to 1920, that prejudgment interest was not available in admiralty suits for personal injury," supporting this quote with cites to two pre-1920 cases[15] which, upon careful reading, no longer apply. (Petition for *Certiorari* at 14.) Defendants' contentions to the contrary notwithstanding, neither *The ARGO* nor *Union Steamboat Company v. Fitzgibbons* rejected prejudgment interest in personal injury actions on the ground that such recovery was not part of the General Maritime Law. They only refused to award prejudgment interest due to the formerly accepted premise that such

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[14] *The Amiable Nancy* at 558.

[15] *The ARGO*, 210 F. 872, 875 (9th Cir. 1914) and *Union Steamboat Company v. Fitzgibbons*, 261 F. 768, 770 (7th Cir. 1919).

interest was not permitted until the amount of the damages was judicially determined. However, the basis for this argument has since been rejected and it is now well established that awarding prejudgment interest only on judicially determined damages is no longer valid. As this Court stated in *City of Milwaukee* "the liquidated/unliquidated distinction has faced trenchant criticism for a number of years." *City of Milwaukee* at 2096. *See Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 444 (1st Cir. 1991) ["a plaintiff's immediate loss and the usual delay in payment may warrant the granting of prejudgment interest on unliquidated tort claims, including claims for pain and suffering."] Furthermore, this Court stated that "[i]t has been recognized that a distinction, in this respect, simply as between cases of liquidated and unliquidated damages, is not a sound one." *City of Milwaukee* at 2096, n. 9. (citations omitted). *See Hillier v. Southern Towing Co.*, at 586, n. 4 ["The distinction between "liquidated" and "unliquidated" damages has not been determinative in admiralty cases."](citations omitted).

Accordingly, defendants' reliance on *The ARGO* and *Union Steamboat Company v. Fitzgibbons* is misplaced, as is their complete misstatement of the law that prior to 1920 prejudgment interest was not available in personal injury actions. Prejudgment interest has always been part of the General Maritime Law of the United States and is an element of the damages which can be awarded in personal injury actions.

4. There is no split in the federal circuits concerning the awarding of prejudgment interest under General Maritime Law or under the facts of this case and every court, without exception, would have decided the present matter in the exact same manner.

In order to have their Petition accepted, defendants must further convince this Court that there is a split in the federal circuit courts concerning the issue of prejudgment interest. Having no support for their argument that prejudgment interest is not an element of damages recognized under the General Maritime Law, they have made the similarly unsupportable argument that the law in this area is somehow not settled. Furthermore, the various examples cited by defendants which attempt to show that various courts would decide the issue differently are inapplicable to this case.

The actual posture of this case on the issue of prejudgment interest under General Maritime Law is remarkably different than the examples presented by the defendants. Prejudgment interest was awarded by the trial court only on the portion of the award which was specifically allocated by the jury to unseaworthiness. Further, plaintiff never requested interest on the portion of the award attributed to negligence. Consequently, defendants' arguments concerning what other jurisdictions would do in situations involving prejudgment interest awards rendered when findings are based on negligence, when cases are tried at law or in admiralty, when the issue was not presented to the jury or when an award was not apportioned between unseaworthiness or negligence, are all irrelevant and not pertinent to the issues before this Court, nor do they represent some split in the

circuit courts. Clearly, as to the simple issue raised here of whether prejudgment interest is recoverable in an unseaworthiness action brought pursuant to the General Maritime Law where the jury apportions the damages, it is clear beyond peradventure that the answer has consistently been in the affirmative.

A review of the various circuit courts[16] which have addressed similar situations reveals that under the facts of the present matter they all would render the exact same verdict. In fact, the issue is so well-settled that it is acknowledged by the defendants in their Petition.[17] As for the remaining circuit courts, research of their case law does not reveal a single case in which, under the facts of the present matter, an award of prejudgment interest on the portion of the award attributed to the unseaworthiness of a vessel has been denied based on a finding that prejudgment interest is not a recoverable element under maritime law.

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[16] *See Domangue v. Penrod Drilling Co.*, 748 F.2d 999 (5th Cir. 1985); *Havis v. Petroleum Helicopters, Inc.*, 664 F.2d 54 (5th Cir. 1981); *Borges v. Our Lady of the Sea Corp.*, 935 F.2d 436, 444 (1st Cir. 1991); *Robinson v. Pocohontas, Inc.*, 477 F.2d 1048 (1st Cir. 1973); *Petersen v. Chesapeake & Ohio Ry. Co.*, 784 F.2d 732 (6th Cir. 1986); *Glynn v. Roy Al Boat Management Corp.*, 57 F.3d 1495 (9th Cir. 1995), *cert. denied*, 516 U.S. 1046, 133 L.Ed.2d 663, 116 S.Ct. 708 (1996).

[17] "By lower courts, we mean not only the lower courts below, but all lower federal and state courts which, without exception, allow a Jones Act seaman to recover prejudgment interest if the judgment is not based on negligence." (Petition for Writ of *Certiorari* at 4.)

Nevertheless, and despite the aforementioned overwhelming and uniformly accepted law, the defendants attempt to argue that the case of *Magee v. U.S. Lines, Inc.*, 976 F.2d 821 (2nd Cir. 1992) somehow is inconsistent. In fact, *Magee* does not apply to the present matter. Specifically, the defendants have mischaracterized the posture of the *Magee* case as it was before the district court, mistakenly stating that it was "at law". While it is true that the case was tried before a jury, the award of prejudgment interest was actually made by the Court pursuant to an agreement between the parties to have the court, rather than the jury, decide this issue. *Id.* at 822. As such, the prejudgment interest issue was decided by the court as if sitting in admiralty, so that the district court's award of prejudgment interest on both the unseaworthiness and the Jones Act was not improper under the current law.

Furthermore, even if it is accepted that the *Magee* case somehow improperly awarded interest on the portion of the award attributed to negligence, it still does not apply to the matter which is before this Court. As we have repeatedly stated, this matter correctly involves only the award of prejudgment interest on the unseaworthiness portion of an award rendered by a jury who was asked to award such interest. There is not one case which holds that an award under these circumstances is somehow improper and thus there can be no conflict among the circuit courts.

CONCLUSION

Every argument asserted by the defendants in their Petition was presented to and rejected by the trial court, the Fourth Circuit Court of Appeals and the Louisiana Supreme Court. They present no new evidence and no new case law which would warrant reversing the opinion of the lower courts on these issues. Their further attempts to persuade this Court that there is a split among lower courts concerning prejudgment interest, relying on their improper categorization of one distinguishable case from the Second Circuit Court of Appeals, should also be rejected. Finally, their veiled suggestions that this Court should also review the facts decided by the jury in this case must also be refused.

Under the facts of this matter, there is no doubt that prejudgment interest on the portion of the award attributed to unseaworthiness, or $71,242.50, was proper in all respects and we respectfully request that this Court deny defendants' Petition for Writ of *Certiorari*.

Respectfully submitted,

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APPENDIX A

Civil District Court for the Parish of Orleans

State of Louisiana

No. 89-898 **Divison "N"** Section 8

Lee Selico

versus

Intercontinental Bulktank Corp. And Maritime Overseas Corporation

Filed: _____ _____

Deputy Clerk

(Filed Sept. 30, 1997)

JURY INTERROGATORIES

1. Do you find from a preponderance of the evidence that the vessel SS OVERSEAS ALASKA was unseaworthy on or about May 28, 1987?

   ✓ YES _ NO

   If your answer to Interrogatory Number One was "NO," please skip to Interrogatory Number Four.

2. If your answer to Interrogatory Number One was "YES," do you find from a preponderance of the evidence that the unseaworthiness of the vessel SS OVERSEAS ALASKA was the proximate cause of any injuries to the Plaintiff, Lee Andre Selico?

   ✓ YES _ NO

3. **If your answer to Interrogatory Number Two was "NO," please skip to Interrogatory Number Four.**

   Do you find a preponderance of the evidence that the Plaintiff is entitled to recover pre-judgment interest in this action?

   _ YES ✓ NO

4. Do you find from a preponderance of the evidence that the Defendants, Maritime Overseas Corp. and Intercontinental Bulktank Corp., were negligent on or about May 28, 1987?

   ✓ YES _ NO

   If your answer to Interrogatory Number Four was "NO," please skip to Interrogatory Number Seven.

5. If your answer to Interrogatory Number Four was "YES," do you find from a preponderance of the evidence that such negligence played any part, no matter how slight or how small, in causing or contributing to the injuries, if any, sustained by the Plaintiff, Lee Andre Selico?

   ✓ YES _ NO

   If you answered "NO" to both Interrogatory Number One and Interrogatory Number Four, please date and sign the jury interrogatory form and return to the courtroom.

6. If you answered "YES" to both Interrogatory Number One and Interrogatory Number Four, please state, in percentage terms, how much of your award is based on the negligence of the defendants and how much of your award is based on the unseaworthyness of the SS OVERSEAS ALASKA. If you cannot determine how much of your damage award is based on the negligence of the Defendants and how much of your award is based on the unseaworthyness of the vessel, please state that on this form.

Negligence	50%
Unseaworthiness	50%

7. What amount of money, if any, do you find from a preponderance of the evidence, adequately and fairly compensates the Plaintiff for his damages?

Answer in dollars and cents:

Past Wages	$17,845.01
Past, present, and future suffering, disability, mental anguish, and loss of capacity for the enjoyment of life:	$125,000.00

You are instructed that the amount of money, if any, should not be reduced by any amount you may find that the Plaintiff was himself negligent, if any.

8. Do you find from a preponderance of the evidence that the Plaintiff was negligent in a manner that contributed to causing his injuries, if any?

_ YES ✓ NO

If your answer to Interrogatory Number Eight was "NO," please sign and date this form and return to the courtroom.

9. If your answer to Interrogatory Number Eight was "YES," please express, in terms of a percentage, the extent, if any, that Plaintiff's negligence contributed to causing his own injuries.

_____ %

New Orleans, Louisiana, this 30 day of Setpember, 1997.

/s/ George W. Johnson
Foreperson